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THE RESPONSIBILITY AT COMMON LAW FOR THE KEEPING OF ANIMALS.

BAKER *v.* SNELL, [1908] 2 K. B. 352, 825.

A RECENT decision of the English Court of Appeal opens up matter of interest as to the responsibility of those who keep dogs and, incidentally, of those who keep other animals classed as *ferae naturae*. The case, which is reported under the name Baker *v.* Snell,[1] turns on the following facts:

A young woman, a housemaid of the defendant, a publican, had been bitten by a dog owned by her master "and known by that master to be ferocious and given to bite." The dog had previously bitten the plaintiff, and special precautions were adopted in keeping him. He was entrusted to the potman, who was not alleged to be incompetent, whose duty it was to let the dog out early in the morning, to exercise him and to have him chained up before the plaintiff and the barmaids came downstairs.

On the day of the occurrence for which the defendant was put to answer, the potman brought the dog into the kitchen where the plaintiff and the barmaids were at breakfast and said, "I will bet the dog will not bite anyone in the room." He then let the dog go, saying as he did so, "Go it, Bob." The dog thereupon flew at the plaintiff and bit her. The plaintiff brought her action. The view of the County Court judge before whom in the first instance the case came was[2] "that although the defendant's act in keeping the dog with knowledge of its savage nature was a wrong-

[1] [1908] 2 K. B. 352, 825.

[2] [1908] 2 K. B. at 354.

ful act in the sense that he kept it at his peril, still under the circumstances it was the potman and not the dog that did the damage, and that the keeping of the dog was only the *causa sine quâ non.*"

The plaintiff appealed to the Divisional Court (Channell and Sutton, JJ.), which ordered a new trial. Channell, J., could not accept the ruling of the County Court judge: "If the potman had been a stranger I should be prepared to uphold the County Court judge's decision." [1] "In my view the potman's act amounted to nothing more than a foolish and wanton act done in neglect of his duty to keep the dog safe; and if that is the right view the defendant would be responsible." This is a hard saying, which, before we part with the case, we shall have to test. Channell, J., further delivered himself of the extraordinary suggestion that it would be open to a jury to find "that the dog bit the plaintiff by reason of its savage nature, and by reason of that alone, and that the act of the potman had nothing to do with the result." It is to be hoped that there is left in the English courts sufficient strength to set aside any such verdict as perverse, even if an English jury could be so foolish as to return such a verdict, in view of the wrongful letting go of the dog and the direct incitement when it was let go. A dog is not, in law, a responsible agent, — a potman is; and Channell, J., for the moment at any rate, seems to have lost sight of the principles that regulate the liability of responsible agents, *i. e.* human agents, when acting in conjunction with irresponsible agents, *i. e.* either natural or brute forces. Sutton, J., whose remarks found favour with the Court of Appeal, confined himself to quoting from May *v.* Burdett [2] that the owner "is bound to keep secure" any animal with a vicious propensity of which he has knowledge, "at his peril." This he explained to mean "that he is liable for any injury caused by the animal biting a person under whatever circumstances the biting may have taken place, except where the plaintiff by his own conduct has brought the injury upon himself."

The defendant then carried the case to the Court of Appeal, which was constituted by two eminent Chancery judges (Cozens-Hardy, M. R., and Farwell, L. J.) who enunciated some very startling theories, and a common law judge (Kennedy, L. J.) who, though taking a different view of some of the salient legal prin-

[1] [1908] 2 K. B. at 355.

[2] 9 Q. B. 101, at 112, 72 R. R. 189 (1846).

ciples involved and one which it is the object of this paper to support, yet concurred in the judgment of the Court and in some of the steps by which it was reached.[1] Cozens-Hardy, M. R., entirely adopted the view of Channell, J.,[2] that the potman's act was "a wanton and foolish act": "an act for which the defendant would be responsible"; and thus by begging one of the most important questions of the case, the liability of the master to one servant for the act of another servant, left himself free to roam through speculations as to the common law liability for keeping animals. He then formulates the following question:[3] "If a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious but which is known by the owner to be dangerous, is the owner of that animal liable only if he neglects his duty of keeping it safe or is negligent in the discharge of that duty, or is he bound to keep it secure at his peril?" He answers his question thus: "In my opinion the latter is the correct proposition of law, and I think that it is not open to the Court to decide the other way."

This conclusion he bases on an elaborate examination of five cases,[4] none of which, my submission is, warrants it. He further says, "If it be true, as I think it is, that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is an authority not merely of the Court of Exchequer, but also of the Court of Appeal, that the person so keeping it is liable for the consequences of his wrongful act even though the immediate cause of damage is the act of a third party." The English of the judge or his reporter is a bit obscure; but it seems to point to a holding that anybody keeping an animal that harms another person not his owner, is absolutely liable and is not to be heard to make a defence. This, so far as the innocent owner is to be held liable for the act of an independent third person, is a principle altogether exceptional in law, save in "insurance" cases or cases of warranty, — that is, where a contractual duty exists, and fails in this case utterly if the principle of warranty is not made out.

To make out this, then, Farwell, L. J., adventures the opinion

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[1] [1908] 2 K. B. 828.

[2] *Ante*, p. 466.

[3] *L. c.* 828.

[4] May *v.* Burdett, 9 Q. B. 101; Jackson *v.* Smithson, 15 M. & W. 563; Nichols *v.* Marsland, L. R. 10 Ex. 255, 2 Ex. D. 1.; Fletcher *v.* Rylands, L. R. 1 Ex. 265, and L. R. 3 H. L. 330; and Filburn *v.* People's Palace and Aquarium, 25 Q. B. D. 258.

[5] [1908] 2 K. B. 833.

that the cases "establish that the law recognizes two classes of animals — animals *ferae naturae* and animals *mansuetae naturae*. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and anyone who keeps an animal of that nature does a wrongful act and is liable for the consequences under whatever circumstances arising." It is, continues the Lord Justice, "absolutely immaterial if the keeper of a dangerous animal keeps it at his own peril in all circumstances whether the injury arises from the actual negligence of the owner or from the act of a third person. The wrong is in keeping the fierce beast."

From this it seems to follow that the members of the Zoölogical Society of London, who keep scores of savage and dangerous wild beasts in their gardens, are continuously occupied in wrongdoing; and were, say, the Germans to take London and open the cages of the wild beasts, would be liable for all the damage that the liberated animals might effect in the course of their wanderings.

The decision of the majority of the Court of Appeal accordingly is, then, that a person keeping an animal *ferae naturae*, or an animal *mansuetae naturae* which is known to be savage (and under this nomenclature is included a Maltese puppy that has snapped at the lady's maid putting him to bed), is answerable in damages for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person, say the housemaid lovingly, but sharply, tweaking his ear.

As against this, four propositions are submitted:

(1) That the authorities cited by the majority of the Court of Appeal do not bear out the conclusion suggested.

(2) That the liability of the owner of a savage beast is *primâ facie* only, and may be rebutted by showing that the owner is wholly without fault: that trespass is actionable only where there is fault.

(3) That, even if this is not so, the case of a dog differs from the case of lions, tigers and savage wild beasts, and that at common law there is an absolute right to keep a savage dog subject to liability *primâ facie* to answer for his misdoings so far as savagery goes.

(4) That the fact that through the fault of one fellow servant another is bitten does not affect an innocent master with any liability.

(1) The principle asserted by Cozens-Hardy, M. R., and Farwell, L. J., is that it is a wrongful act for a person to keep an animal which he knows to be dangerous, that is, one that he knows has attempted to bite someone.[1]

We are now to consider the authorities which the learned judges vouch as establishing this principle.

"In 1846," says Cozens-Hardy, M. R.,[2] "in May *v.* Burdett, the law was laid down by the Court of Queen's Bench in the case of a monkey.[3] The action was brought by a man and his wife to recover damages for a bite to the female plaintiff, and the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large, and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff."

The point argued in the case on motion to arrest judgment[4] was that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. All, then, that it was necessary to decide was whether in an action of this sort the *onus* lay on the plaintiff to prove negligence or whether it was necessary to the cause of action to prove negligence at all. The question whether the defendant might prove facts that exculpated him was immaterial and was not so much as hinted at.

All that, according to the head note of the report,[5] the case did decide is that "A person who keeps an animal accustomed to attack and bite mankind with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by such animal, without any averment in the declaration of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities."

Cozens-Hardy, M. R., incorporates in his judgment the passage from Lord Denman, C. J.'s, judgment with which the head note textually corresponds. He then refers "to a passage in Hale's Pleas of the Crown,"[6] and cites a long passage from Lord Denman's judgment as if it was deduced from the passage in Hale,

[1] Worth *v.* Gilling, L. R. 2 C. P. 1.
[2] [1908] 2 K. B. 828.
[3] 9 Q. B. 101, 111, 112.
[4] 9 Q. B. 110.
[5] 72 R. R. 189, 9 Q. B. 101.
[6] Vol. i, p. 430 b, ed. 1800.

concluding,[1] "we are besides of opinion, as already stated, that the defendant, if he would keep it [the monkey], was bound to keep it secure at all events."

It is obvious that the words "secure at all events" are ambiguous and may be satisfied by regarding the liability as *primâ facie* absolute, but yet as not excluding the defendant from averring circumstances in discharge of liability. Reference to Lord Denman, C. J.'s, judgment shows that the latter is the sense in which he was using the words. He says,[2] immediately before the passage cited by Cozens-Hardy, M. R., "It may be that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that may be a ground of defence, by plea in confession and avoidance; but it is unnecessary to give any opinion as to this; for we think that the declaration is good upon the face of it and shows a *primâ facie* liability in the defendant." Thus no opinion was given in May *v.* Burdett upon the point raised in Baker *v.* Snell: whether, and in what circumstances, the owner of a dog that is known to be ferocious is shut out from averring his absence of liability where he is "utterly without fault" in the circumstances leading up to and causing the injury. But since Cozens-Hardy, M. R., cites the passage from Hale, and since Lord Denman, C. J., bases his conclusions upon it, it would be well to see what Hale says. Here it is:

"If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing hurt and the beast kills a man, by the ancient Jewish law the owner was to die for it, *Exod. xxi*, 29, and with this seems to agree the book of 3 Edw. 3. Coron. 311; Stamf. [*sic*] P. C. 17a, wherein these things seem to be agreeable to law."

"(1) If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it."

"(2) Tho he have no particular notice that he did any such thing before, yet if it be a beast that is *ferae naturae* as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose."

"(3) And therefore in case of such a wild beast or in case of a bull or cow that doth damage, where the owner knows of it, he must

[1] [1908] 2 K. B. 829. [2] 72 R. R. 198, 9 Q. B. 113.

at his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages."

It will be noted that this is a strong authority for the proposition for which Lord Denman, C. J., cited it. It will also be noted that it is an authority against the proposition in support of which Cozens-Hardy, M. R., and Farwell, L. J., use it; for Sir Matthew Hale excepts a dog from the third proposition which he confines to "such a wild beast" as "a lion, a bear, a wolf, yea an ape or monkey" or "a bull or cow."

Such a great common lawyer as Hale would be expected to discriminate a dog from a lion or a monkey; for the considerations to be presently noted could not be absent from his mind.

But to trace the matter home. The authority for Hale's statement is Fitzherbert, Corone, pl. 311, which is thus reproduced by Staundforde:[1] "*Si home ad un jument*[2] *que est accustome a male faire, et le owner ceo bien sachant, ne liga luy, eins luy suffra daller a large, et puis le jument tua un home; que ceo est felony in le owner, eo que per tiel sufferance, le owner semble dauer volunte a tuer. Et nota que in ancient temps la volunte fuyst cy material, que il fuist repute pur le fait ut patet titulo* Corone in Fitz. P. 15. E. 3. P. 383[3] . . . *Et oue ceo accorda Bracton qui dit, in maleficiis spectatur voluntas et non exitus et nihil interest virum quis occidat, an causam mortis prebeat. Mes le ley nest issint a cest jour.*"

There is then nothing here that goes to show an absolute liability for a dog — rather the other way: and the case certainly does not lend any support to the proposition it is cited to establish.

"The next case in point of time," says Cozens-Hardy, M. R.,[4] "was Jackson *v.* Smithson,[5] which raised the point in a very neat form."

There is some ambiguity as to what the learned Master of the Rolls intends by "raised the point." If it is the point in Jackson *v.* Smithson then that is: whether the *plaintiff has to show* negligence in the keeping by the defendant of a ram, known to be accustomed to attack mankind, by which the plaintiff sustained

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[1] Les Plees del Coron, p. 17. The edition quoted from is that of 1583. Rex *v.* Huggins, 2 Ld. Raym. 1583.

[2] *Jumenta a jungendo appellari Nonius putat, quod currui jungeretur, ut equi et muli et coetera dorsuaria animalia, quae Graeci ὑποφόρα vocant. Lexicon Juridicum, sub voce.*

[3] The reference, in reality, is to Fitz. Abr., tit. Corone, P. 15. E. 2. P. 383.

[4] [1908] 2 K. B. 829.

[5] 15 L. J. Ex. 311, 15 M. & W. 563, 71 R. R. 763.

injury. If the point in Baker *v.* Snell is intended that is: whether the *defendant*, the owner of a dog known to be savage, *is precluded from showing* facts the conclusion from which is that he is blameless for injuries inflicted by his dog on the plaintiff. The former point may be neatly raised or not, but it is the exact point decided in May *v.* Burdett; and the remarks before made apply equally to it; the latter, which is the only relevant point here, is not even glanced at.

Cozens-Hardy, M. R., read the judgments delivered *in extenso*. They are emphatic that the case of Jackson *v.* Smithson is concluded by May *v.* Burdett; that is, that the *onus* suggested was not on the plaintiff. The judges of those days in the Exchequer were far too wary logicians to deduce from their negative conclusion an affirmative proposition that as the plaintiff was not put to prove negligence the defendant was debarred from showing as an effective defence that he was utterly without fault. Yet this is the leap into vacancy made by the learned Master of the Rolls and Farwell, L. J., a leap which must necessarily be taken in order to give even a semblance of relevancy to their proposition.

Two *obiter dicta* in Jackson *v.* Smithson must be noticed: one of Alderson, B.: "In truth there is no distinction between the case of an animal which breaks through the tameness of its nature and is fierce, and known by the owner to be so, and one that is *ferae naturae*."[1] Yet this may well be without restricting the owner of either from the right to defend himself on lines hereafter to be developed, and of course restricting the analogy to what hereafter will be shown to be the *fundamentum relationis*, that is, that each is regarded as property simply. The other *obiter dictum* is that of Platt, B.: "No doubt a man has a right to keep an animal which is *ferae naturae*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." May *v.* Burdett, which concludes this case of Jackson *v.* Smithson, shows beyond cavil, as has already been demonstrated, that responsible *primâ facie* is what is intended. The dictum is, however, flatly in contradiction of Farwell, L. J.'s, assertion[2] that anyone keeping an animal known to be dangerous — the lion, for example, at the Zoölogical Gardens — "does a wrongful act."

[1] Between a dog, for instance, and a fox.

[2] [1908] 2 K. B. 833.

It is curious that Cozens-Hardy, M. R., and Farwell, L. J., should have regarded the next case they cite, Nichols *v.* Marsland,[1] as authority for their proposition; for the judgment of the Court of Appeal there is based on the rule of law laid down in Rylands *v.* Fletcher:[2] "We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, *must keep it in at his peril; and if he does not do so, is* primâ facie *answerable for all the damage which is the natural consequence of its escape.* He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

It may be objected, indeed it has been by Farwell, L. J., that the exceptions noticed here are an exhaustive enumeration of the possible exceptions and not mere illustrations of what may be exceptions. But a glance no further than the opposite page of this report[3] refutes this, for Mellish, L. J., commenting on the passage just noticed, adds another exception to those enumerated, namely, the act of "the Queen's enemies." Yet why is *primâ facie* to be read if *primâ facie* is not intended but "absolutely without qualifications"? There is, however, one passage quoted by Cozens-Hardy, M. R., which reads strongly against the absolute principle which he formulates. It is this:[4] "The ordinary rule of law is that when the law creates a duty and the party is disabled from performing it without any fault of his own, by the act of God or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity."

Now in the present case the duty incumbent on the keeper of a wild animal or a savage dog, whatever it may be, is clearly a duty created by the law; and it needs considerable subtlety of mind to understand how a case, which incidentally affirms the proposition that where a party is disabled from performing a duty without any fault of his own the law will excuse him, can be usefully cited in support of the proposition that where a party is disabled from

[1] L. R. 10 Ex. 255, in Ct. of App., 1 Ex. D. 1.

[2] L. R. 3 H. L. 339.

[3] Quoted from 2 Ex. D. 5.

[4] [1908] 2 K. B. 831, citing Mellish, L. J., in Nichols *v.* Marsland, 2 Ex. D. 4.

performing a duty without any fault of his own the law will *not* excuse him.

In any view the only question decided in Nichols *v.* Marsland — the question of law which was left undecided in Rylands *v.* Fletcher — was, "Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*":[1] not what are the circumstances in which a defendant may excuse himself, but the much narrower issue whether *vis major* is one of them.

Filburn *v.* People's Palace and Aquarium Co.[2] is the last case cited by Cozens-Hardy, M. R. He considers it[3] "a strong authority" for the proposition that a person keeping an animal that he knows to be dangerous is liable "for the consequences of his wrongful act even though the immediate cause of damage is the act of a third party."

The head note in Filburn's case is as follows:

"In an action to recover damages for personal injuries sustained by the plaintiff from an elephant which was exhibited by the defendants, the jury found that the defendants did not know the elephant to be dangerous: — Held, that the defendants were liable, as the animal did not belong to a class which according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character."

It may be noted that the defendant nowhere sought to excuse himself by alleging act of God, or of the King's enemies, or any such defence. The only point was whether the English courts would regard an elephant as *mansuetae naturae;* and they declined to do so. It is a far cry from this to the affirmation of a principle that, where the owner of a beast *ferae naturae* is without any fault of his own disabled from performing the duty of safe custody that the state has imposed upon him with regard to it, the law will not excuse him.

Yet these are the authorities from which Cozens-Hardy, M. R., draws his conclusion that it is "settled law"[3] that a person keeping an animal *mansuetae naturae* which is known by him to be savage is answerable in damages for any harm done by the animal even though the immediate cause of the injury is the intervening voluntary act of a third person. This conclusion, it may be noted,

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[1] 2 Ex. D. 4. [2] 25 Q. B. D. 258. [3] [1908] 2 K. B. 832.

is reached through an assumption that involves the proposition that a pampered but irritable Maltese terrier is esteemed by the common law to be indistinguishable from a man-eating tiger: a draught from that reservoir of the principles of the common law which, Lord Coke tells us, resides in the breasts of His Majesty's judges.

Yet before dismissing this portion of our subject it will be well to note the case of Card *v.* Case,[1] not referred to by Cozens-Hardy, M. R., nor reprinted in the Revised Reports. The reason for this omission probably is that the decision is upon a mere pleading point, the effect of a plea of Not Guilty.

The defendant was the owner of a dog which had chased and killed sheep belonging to the plaintiff, but the defendant had no knowledge of any propensity in his dog to worry sheep. The question was whether proof of knowledge could be required of the plaintiff under the pleadings for the plaintiff to make out a case. It was held that it could and the plaintiff was non-suited.

In giving judgment, however, Maule, J., says:[2] "Now the cases of May *v.* Burdett and Jackson *v.* Smithson and the general course of precedents and authorities referred to in the former case, prove that the wrongful act is the keeping of a ferocious dog knowing its savage disposition; and that an action of this kind may be maintained without alleging any negligence": all which may be conceded without affecting this argument, since it is common ground that there are circumstances, *e. g.*, the plaintiff's own act, the act of the King's enemies, *vis major* (and it is suggested other circumstances), which will discharge the strong *primâ facie* liability that is on the defendant.

Another and later expression by a judge of the same Court should be noticed as it is in a line with Cozens-Hardy, M. R., and Farwell, L. J.'s opinion. Williams, J., in Cox *v.* Burbidge[3] says: "If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial." This it may be noted leaves

[1] 5 C. B. 622 (1848). *Cf.* Thomas *v.* Morgan, 2 Cr. M. & R. 496.

[2] 5 C. B. 633. See reporter's note at 624.

[3] 13 C. B. N. S. 438. *Cf.* Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10; also for remarks of Brett, L. J., see 44 L. J. C. P. 26.

open the point now contended for, that the right of action is *primâ facie* only: *e. g.*, would not arise if the trespass were due to the King's enemies driving it there; or other circumstances utterly without my fault, such as my own enemy driving it there.

One point made in Card *v.* Case may here be noticed: the gist of the action for injury from a savage dog is not the keeping of the dog but the keeping him with knowledge of his savage disposition; but as Pratt, B., points out,[1] even in the case of an animal *ferae naturae* (which will presently be shown to be only identical with a dog to a limited extent) nobody — not even the Attorney General — has a right to interfere with another in doing so "until some mischief happens." Then (as in the analogous case of an adjacent landowner making excavations which bring down the surface of his neighbour's land) there is an action based on the damage done which arises only on the occurrence of the injury. The keeping of an animal *ferae naturae* is, therefore, by the common law, with all apologies to Farwell, L. J., not a wrongful act; but it may become so on injury happening to a third person.

We have, however, already seen that it is not every injury that is sufficient to bring about this consequence; but, if that is so, the view contended for here *may* be right, that the owner is not liable for injuries that he is utterly unable to prevent; *e. g.*, such injuries as arise directly through the act of an independent wrongdoer, as in this case, and of which the owner is utterly blameless; for it is conceded that the principle does not cover injuries that "the plaintiff by his own conduct has brought" upon himself;[2] and one exception being established there may be others also; indeed so much is admitted. We must see what they are.

We are told, for instance, in the judgment in that case which places this liability at the highest point,[3] and in a passage already set out, that "the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his own peril"; and this is the principle that is vouched for the present contention of the majority of the Court of Appeal. The limitation on this is, however, quite ignored; which Bramwell, B., thus states:[4] "What has the defendant done wrong? What right of the plaintiff has

[1] Jackson *v.* Smithson, 15 M. & W. 565.
[2] [1908] 2 K. B. 833.
[3] Fletcher *v.* Rylands, L. R. 1 Ex. 265, 279; L. R. 3 H. L. 330, 339, 340.
[4] Nichols *v.* Marsland, L. R. 10 Ex. 255, 259.

she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house and the water did mischief to a neighbour the occupier of the house would be liable. That cannot be." [1]

But there is an absolute analogy to the case of keeping a wild animal — that of fire introduced on a man's land: surely as dangerous and as liable to become uncontrollable as dog or monkey or tiger.

In Beaulieu *v.* Finglam [2] the declaration alleged that every person by the custom of this realm shall keep his fire safely and securely, and is bound so to keep it lest any danger happen to his neighbour in any manner. Yet though the obligation is alleged as absolute, Markham, J., says: "If a man outside my household against my will sets fire to the thatch of my house or does otherwise *per quod* my house is burned and also the houses of my neighbours, I shall not be held to answer for them because this cannot be said to be ill on my part, but against my will."

This case is cited by Comyns [3] and by Viner [4] for the proposition that by the common law a man in whose house a fire originated, though by no act or fault of his, and even if it were accidental, was liable for whatever damage it caused to the house or goods of another.

But the same writers are agreed that if a *stranger* against my will puts fire in my house, by which the house of my neighbour is burnt, no action lies against me; and this was approved by Holt, C. J., and the judges of the King's Bench.[5] In Comyns's Reports [6] the judgment of the Court assigns the reason of the decision "for the duty to take care of" fire "is founded upon this maxim, *Sic utere tuo ut non laedas alienum;* [7] but if the fire of the defendant by

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[1] Later on in the judgment the learned judge draws a distinction between water and a "wild or savage animal," and towards the end of the judgment he uses the often quoted illustration of lightning breaking the chain of the tiger.

[2] Y. B. 2 Hen. IV, 18, p. 16.

[3] Action on the case for negligence, A. 6.

[4] Actions — B for fire.

[5] Turberville *v.* Stampe, Ld. Raym. 264.

[6] Vol. i, 33.

[7] Note that this is the ground of decision in Rylands *v.* Fletcher, L. R. 2 H. L. 330, and see particularly per Lord Cranworth, 341.

inevitable accident, by impetuous and sudden winds, and without the negligence of the defendant or his servants (for whom he ought to be answerable) [1] did set fire to the clothes of the plaintiff in his ground adjoining; the defendant shall have the advantage of this in evidence, and ought to be found not guilty."

Here then in the case of fire is an exact analogy to the case of the keeping of an animal *ferae naturae* where by the common law an absolute obligation was yet held to admit of proof that the defendant was utterly without fault and was therefore free from liability. Considerations of space do not admit of further elaboration of this part of the argument.

My submission is that what has been said justifies the proposition with which we set out, that the authorities examined do not justify their conclusion but do warrant a conclusion contradictory to that of the Court of Appeal.

(2) The liability of the owner of a savage beast and, *a fortiori* of a dog, is *primâ facie* only and may be rebutted by showing that the owner is wholly without fault: trespass is actionable only where there is fault.

There are several misapprehensions that must be removed before we can enter on the question whether the liability for the bite of a savage dog is by the law of England absolute, in the sense of Farwell, L. J.,[2] " under whatever circumstances arising," or whether it may be excused when the act complained of is utterly without the fault of the defendant, as by the act of an independent wrong doer.

The most noteworthy of these misapprehensions is that of Farwell, L. J.: [3] " The cases in my opinion establish that the law recognizes two classes of animals — animals *ferae naturae* and animals *mansuetae naturae*. Any animal of the latter class when known to its owner to be dangerous falls within the former class, and any one who keeps an animal of that nature does a wrongful act," etc. Now passing for the moment the bad law in this statement, note the frailty of its logic. It assumes that all animals *ferae naturae* are governed by the same law; indeed the Lord Justice builds on this as a postulate. Accordingly it must be a shock to the Lord Justice to find that for the ferocities and trespasses of by far the greatest number of *ferae naturae* in England there is no liability at all. For

[1] But this only so far as "it shall be intended that the servant had authority from his master, it being for his benefit." Ld. Raym. 265.

[2] [1908] 2 K. B. 833. [3] *Ibid.*

rabbits are *ferae naturae;* yet where a man so encouraged rabbits on his land that they multiplied to such numbers that his neighbours' lands were destroyed by being overrun with them it was adjudged that the neighbours had no remedy; "for so soon as the coneys come on his neighbour's land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property and which the other may lawfully kill."[1] This is not obsolete but living law which has within the last few years been considered by the courts.[2]

Again, a fox is *ferae naturae;* yet Twisden, J., is reported in Mitchil *v.* Alestree[3] as saying, "If one hath kept a tame fox, which gets loose and grows wild, he that kept him shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature. *Vide* Hobart's Reports, 134. The case of Weaver *v.* Ward." And *a fortiori* this holds of all foxes kept on land but not tamed.

Yet again, to take another class of *ferae naturae*, — swans, — the rule of law is quite different with regard to them, as reference to the Case of Swans[4] will abundantly demonstrate.

Yet another rule is found as to "*des bestes savages*" — this time deer which had escaped from a park — in the 12 Henry VII (1497); and are reported about in Keilwey's Reports, 30; and for whose trespasses it is there held that there is no liability.[5]

Already enough exceptions have been instanced to demonstrate the error of the assumption made by Farwell, L. J., that the law is the same with regard to all animals *ferae naturae:* that, given the class of *ferae naturae*, the property of imputing liability for their trespasses attaches to all animals that are members of the class.

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[1] Boulston's Case, 5 Co. 104 b.

[2] Ferrer *v.* Nelson, 15 Q. B. D. 258 (1885), a case in which Kennedy, L. J., was counsel.

[3] 1 Vent. 295 (1676); Brady *v.* Warren, [1900] 2 I. R. 632, 661.

[4] 7 Co. 15 b. The following passage (p. 17 a) has always seemed to me too quaint not to be brought to light on every relevant occasion: "for the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is to die so joyfully that he sings sweetly when he dies; upon which the poet saith:

Dulcia defecta modulatur carmina lingua,
Cantator, cygnus, funeris ipse sui," etc.

A very dubious compliment to the female!

[5] See Y. B. 10 Hen. VII, 6, pl. 12, and *ibid.* 30, pl. 28.

The same illicit assumption is nevertheless also made by Kennedy, L. J.[1]: "*There is no doubt* that the keeper of a ferocious dog if he knows it to be ferocious is in exactly the same category as the keeper of a naturally wild animal." What category is that? The same as a rabbit, a fox, a swan, or a deer escaped?

Here attention may be directed to the reversal in this case of the usual practice of the Court of Appeal; a practice inseparable from correct reasoning when the daily growing complexity of modern life is kept in sight. The value of the common law is that with an exact logic, much to be desired of latter days, it has worked out broad and discriminating general principles apt for the simple needs of a much less complex society than ours. The application of these principles is made by the courts today, not by generalizing these principles but by differentiating them: we have long had the general distribution of legal principles. The work of today is to specialize. If the generalization of the common law was such (which it was not) that it did not distinguish between the pet black and tan terrier shivering with nervousness and the caged tiger at the Zoölogical Gardens, then a sense of humor and of the ridiculous, if not the dictates of common sense, would seem to impel the Court of Appeal to do so, and to lay stress on the essential difference of the two cases, obvious to the most obtuse, rather than to perpetuate an absurdity and add new life to it. As a matter of fact the Court of Appeal has exerted itself to affirm an identity that the common law never asserted, instead of to define a principle that the common law at the worst had only too generally and ambiguously stated. But of this presently when we have contemplated for a moment Bramwell, B.'s, chained tiger.

Another misapprehension that must be noticed has seized upon Bramwell, B.'s, doubt.[2] "I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." The rule of law is clear *Actus Dei nemini facit injuriam*: a rule to which we have not yet found an exception. Why should the tiger make one, or have one made for him? Channell, J.,[4] and Kennedy, L. J.,[3] agree, and it is submitted are right in their opinion, that there is no such special rule. We will proceed to consider why.

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[1] [1908] 2 K. B. 834.
[2] Nichols *v.* Marsland, L. R. 10 Ex. at 260.
[3] [1908] 2 K. B. 354.
[4] *Ibid.* 835.

A consideration of the cases of the rabbit, the fox and the deer compared with that of the tiger may enable us to get a glimpse of what was in Bramwell, B.'s, mind; for there is no doubt that the rule governing one class of these animals *ferae naturae* is different from that prevailing in the other.

If the fox has betaken himself to a hole in a wood adjacent to a poultry yard, there is no liability on his late owner for his maraudings. If a tiger has taken up his quarters in a cave near a cow shed which he resorts to as his larder, the expense of his keep will nevertheless fall on his abandoned owner. The reason for this difference of treatment is this: the fox has merely cast off disabilities, resumed his freedom and returned to his natural home; he has become once again identified with his kind. The tiger has not been able to do this. He is not indigenous; he is an importation. He is merchandise.[1] He is property with the marks of his identity as such indelibly stamped on him, by his rareness, if not by his individuality. If one bring a tiger upon property he is bound to safeguard against danger from him to just the same extent as one bringing a reservoir filled with water on to land, though the tiger is not so dangerous. Bramwell, B., in looking at this aspect of the tiger as a beast brought for whim as property to a place where by nature's ordering no tiger was, has a qualm whether the responsibility of bringing a tiger into a district to live is not so serious an undertaking as to require additional safeguards to those attaching to the common law: is not the possessor of property so extremely hazardous bound absolutely to safeguard it? Glancing at the point incidentally he expresses the doubt — that is all.

Tigers and lions[2] could not have been imported in such quantities in the times in which the common law was taking shape as to be the subject of a separate principle devised for dealing with them, on the ground that they were *ferae naturae*. They may be accretions to the class by reason of their strong characteristics; they

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[1] "So a man may have a property in monkeys, parrots, etc., for they are merchandise and valuable": Comyns, Biens (F.) What things are *nullius in bonis*.

[2] The earliest record there is of lions in England is in William of Malmesbury's *De Gestis Regum Anglorum*, Bk. V, § 409 (p. 485 in the Rolls Series Edition). *Paulus Orcadum comes quamvis Noricorum regi hereditario jure subjectus, ita regis amicitias suscipiebat ut crebra ei munuscula missitaret: nam et ille prona voluptate exterarum terrarum miracula inhiabat, leones, leopardos, lynces, camelos, quorum foetus Anglia est inops, grandi, ut dixi, jocunditate a regibus alienis expostulans: habebatque conseptum quod Wudestoche dicitur, in quo delicias talium rerum confovebat.* This was before A. D. 1135. There is a ridiculous story of the lions in the tower of London in the time of James I in Notes and Queries (4th ser.), vol. ii, p. 73. Tigers do not seem to be noticed at all.

did not go originally to create it. We see then that the being *ferae naturae* is not (as the Court of Appeal is unanimous in supposing) the ground of the liability for the acts of an escaped tiger or of a biting dog. If it were so the liability would extend to the devastations of rabbits, the thefts of foxes, the evil wrought by squirrels, jackdaws and the rest, which it plainly does not. For the rule of liability for the mischief done by animals *ferae naturae* is diverse; and the ground of the diversity is whether the mischievous agency is property or not. This does not seem to have occurred to any member of the Court of Appeal. They accept a loose statement and clothe it with a pretence of uniformity where in truth there is none.

The fact of being property is what was seized on by the common law as the test to determine that the owner of a lion or a tiger or a monkey is liable for the mischief it does; and thus to include dogs in the same class as property, the pet poodle with the infuriated lion, is logical; to class them together on account of kindred ferocity is wholly irrational.[1] This plainly appears from Ireland *v.* Higgins,[2] a case decided so long ago as the year of the Spanish Armada's visit — and where it is said: "Horses, cows and all cattel[3] which are most profitable for the service of man were at first *ferae naturae*, and so were dogs also; but since by use nothing is so familiar and domestick to man than is a dog, and then he cannot be *ferae naturae;* and therefore a trespass will lye for a dog, if he declare his dog, for that word does imply it is his domestic dog; and he much relyed on a book, the roll whereof he had seen Trin. 15 H. 7 Rot. 35, where a man justified in a trespass of battery in defence of his dog"; and the Court were all of this opinion.

But if this is so and the liability we are inquiring into is that which attaches to an owner of property whose property has done damage, there remains to be considered: what is the common law liability in trespass; is it absolute for all cases, or is it excluded where the owner is shown to be utterly without fault?

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[1] Y. B. 12 H. VIII, f. 3, pl. 3, which is quite a *locus classicus*. Comyns, Biens (F.). What things are *nullius in bonis. Ferae Naturae.*

[2] Owen, 93.

[3] "'Chattels' is a French word and signifies goods which by a word of art we call *catalla*. Now goods or chattels are either personall or reall. Personall, as horse, and other beasts, household stuffe, bowes, weapons and such like; called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions." Co. Litt. 118 b.

This subject has been discussed with great ability by Mr. Justice Holmes in his "The Common Law," [1] who adopts the second of the alternatives suggested. He cites amongst others two very high authorities for his conclusion: Shaw, C. J.,[2] who says, "We think as the result of all the authorities the rule is correctly stated . . . that the plaintiff must come prepared with evidence to show that the intention was unlawful or that the defendant was *in fault;* for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable"; he also cites Nelson, C. J.: [3] "No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. All the cases concede that an injury arising from inevitable accident or, what in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against is but the misfortune of the sufferer, and lays no foundation for legal responsibility."

These authorities would be sufficient were the law of England in all respects the same; but we find that, after an examination of the judgment of Blackburn, J., in Rylands *v.* Fletcher, Earl, C., says: [4] "This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property."

We are therefore driven to the English cases to see whether, in the case of animals, they warrant a rule of absolute liability irrespective of blame which Earl, C., seems to assume is the American rule applicable to live animals.

What then is the English rule of law applicable to live animals? Blackburn, J.,[5] answers thus: "There does not appear any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour." This is the conclusion arrived at after an examination of the cases

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[1] Eng. Ed., 77 *et seq.*

[2] Brown *v.* Kendall, 60 Mass. 292, at 295.

[3] Harvey *v.* Dunlop, Hill & D. Supp. (Lalor) (N. Y.) 193.

[4] Losee *v.* Buchanan, 51 N. Y. 476.

[5] Fletcher *v.* Rylands, L. R. 1 Ex. 282.

we have already discussed and the note in Fitzherbert's *Nat. Brevium*, 128, attributed to Hale, which says: "If A and B have lands adjoining, where there is no enclosure, the one shall have trespass against the other on an escape of their beasts respectively, Dyer, 372, Rastal Ent. 621, 20 Edw. IV. 10, although wild dogs, etc. drive the cattle of the one into the lands of the other."

Note that there is nothing said here of the presence of the animals on the neighbour's land differentiating this case from the ordinary law of trespass for which a defence might be put in. The fact that wild dogs had driven them there would not rebut the presumption against the owner; for his duty is to prevent his cattle straying on his neighbour's land; and since they are property he is liable as if the trespass were his own personally; and the fact that the cattle were exposed to wild dogs would be insufficient to show that the owner was "utterly without fault"; still the owner would be admitted to prove that the wild dogs were turned amongst his cattle by an enemy who brought them to his land.[1]

In England there is no distinction between inanimate and animate property brought by a man on to his land, and the rule is that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *primâ facie* answerable."[2]

This juxtaposition of the phrases "at his peril" and "*primâ facie* answerable" in so authoritative a statement of the law of England — for the words are Blackburn, J.'s, in his famous judgment in Fletcher *v.* Rylands — concedes all that is contended for here, that the liability of the owner of a savage dog is *primâ facie* only; it is not a matter for which he is shut out from defence. It therefore does dispense with any necessity to run through that long list of cases from those in the Y. B. 21 Ed. IV. f. 64, pl. 37, and in Y. B. 22 Ed. IV. f. 8, pl. 24, down to that last cited, to make clear that the liability in trespass is not absolute, and, in the case here considered, is *primâ facie* only.

(3) But assume that the argument presented has been wrong up to this point and that there is no right to keep a lion or a tiger, and that the owner is, as Farwell, L. J., says,[3] guilty of "a wrongful act" in keeping one and "is liable for the consequences under

[1] *Cf.* Mitten *v.* Faudrye, Poph. 161 (1624).

[2] L. R. 1 Ex. 279, per Blackburn, J.

[3] [1908] 2 K. B. 833.

whatever circumstances arising." The point now to be made is that by the common law there is nevertheless a right to keep a savage dog. The confusion that has been made by classing dogs with lions and tigers for all purposes has already been pointed out to be due to the law fixing on the feature common to them all of being property. The dog is not in the same class as the escaped fox or the otter at large; because these have resumed the indulgence of their natural liberty and are not property. The dog is legally in the same class as the lion and the tiger, not because his teeth are as wounding, or his claws as terrible, but because he is property as they are. If they cease to be property, as by returning to Africa or Bengal, they may assume the status of the free fox or otter.

One bit of indulgence the law concedes to the dog over the lion or tiger viewing them from the aspect of property; that, though property, his wrongdoing is not imputed to his owner till he has given manifestation of an evil disposition *contra naturam suam* and his owner has notice of his backsliding; for by the common law a dog's disposition is not evil but gentle, while the same common law condemns the tiger's as bad without proof given. So soon as the dog is proved of bad disposition to the knowledge of his owner the rule of property seizes upon him and he is subject to it; not, I again say, because he is *ferae naturae*, but because he belongs to some one who has not prevented him from becoming a source of annoyance to others: he comes under the rule as to the safeguarding of property. He is volatile in disposition; so in his favour the strict rule of the duty as to property is relaxed and his transgressions are usually comparatively harmless; so that they are as a rule indulgently overlooked by the common law. He errs *contra naturam suam* by biting or any serious misdoing, and when his transgression is brought to the knowledge of his master he is brought into the severity of the rule that covers lions and tigers, and accumulations of water, or any dangerous dealing with property. Yet even when he has acquired the worst reputation the common law does not think of identifying him, as Farwell, L. J., supposes, with lion or tiger; for he may wander about merely trespassing at his will, and the law looks as indulgently on him as it does on the old maid's tabby cat, who may perambulate the tiles unchecked.[1]

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[1] Brown *v.* Giles, 1 C. & P. 118, 38 R. R. 769.

But the three learned judges of the Court of Appeal do not think thus, and they are unanimous on this point. "There is no doubt," says Kennedy, L. J.,[1] "that the keeper of a ferocious dog if he knows it to be ferocious is in exactly the same category as the keeper of a naturally wild animal." "Anyone who keeps an animal of that nature [*i. e.*, keeps an animal *ferae naturae*] does a wrongful act and is liable for the consequences under whatever circumstances arising," says Farwell, L. J.;[2] while Cozens-Hardy, M. R.,[3] vouches that "it is a wrongful act for a person to keep an animal which he knows to be dangerous."

Before we apply ourselves to this piece of wisdom it may not be unprofitable to reflect on the state of rural England when the Common Law was forming, and, indeed, at any time up to the passing of the Reform Act; of England during the period of the Scotch and Welsh frontier disturbances; of England, and specially Yorkshire, during and after the period of the pilgrimage of Grace or of the rebellion of the Northern Earls; or of England during the period of the French wars or the wars against Napoleon. Effective police system there was none; footpads beset the byroads; lonely country houses were exposed to peril alike from ruffians born, disbanded soldiers and escaped French prisoners. Yet on the authority of the three learned judges we are told that to keep a savage dog as a guard for person or property against these perils was a "wrongful act." This being so, and as we have record of a bill filed in Chancery by a highwayman against his comrades to secure the equal distribution of spoils reaped on Hounslow Heath it is wonderful that we have no record of any application to the Farwell, L. J., of some past day to restrain the owner of some lonely manor house, marked down for plunder, from impeding operations by keeping the savage dogs kept, as their best protection, generation after generation, by dwellers in the country. If these dogs were only kept on the condition that they were warranted not to bite, what protection could they afford? Take the case that we are considering, a case of today, the case of an East London publican whose best, if not only effectual, protection against back door pot stealing sneaks is the wholesome knowledge of the presence of a dog that has had its bite and is waiting for another; are we to accept the view of the Court of Appeal that the keeping of such a dog is a wrongful act, a misdemeanour? Common sense

[1] [1908] 2 K. B. 834. [2] *Ibid.* 833. [3] *Ibid.* 832.

is emphatic against such an absurdity; so, fortunately and not less uncompromisingly, is common law.

There was no law more savagely executed by the Norman Kings than the Forest Law, and no privilege that they more relentlessly guarded than their hunting rights. Yet even they had to recognize the right which the three learned judges deny — the right of the subject to keep savage dogs — for to do so, say they, is a "wrongful act." Thus Manwood,[1] who wrote on the Forest Law in the reign of Queen Elizabeth has: [2] "(1) The laws of the forest do so much regard the necessary use of dogs for the safety of men's goods and houses who live within the boundaries thereof, that certain dogs are suffered to be kept therein by any person whatsoever. . . . (2) Every farmer and freeholder dwelling in a forest may keep a mastiff about his house; but such mastiff must be lawfully expeditated [3] according to the laws of the forest; *viz.*, by the Assizes of the Forest made in the reign of Hen. II, Cap. 6, called the Assizes of Woodstock, Mastiffs must be expeditated in a forest where the wild beasts have any peace. . . ." Moreover, though it was a serious crime for a man to kill a stag, yet by Article 9 in 6 Edw. I, *in Assisa forestae, Si quis mastivus inventus fuerit super aliquam feram et mutilatus fuerit, ipse, cujus canis erit, quietus erit de illo facto;* because, as I suggest, the importance was so great of allowing the forest dweller to have a fierce house guard.

Further on Manwood states,[4] "Budæus calleth a mastiff *molossus;* and, in the old British language, that and all other barking curs about houses in the night, were called *masethefes;* because they maze and fright thieves from their masters"; and Coke gives the same questionable derivation with the same indubitably true underlying meaning: that the purpose of keeping them was to terrify wrongdoers and keep them from their masters and their houses. Yet the three learned judges appear to hold that this was an unlawful purpose, and that the dogs could only be kept if they were known to be useless for the purpose for which they were kept.

But if it was a right of the subject to keep these savage dogs even

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[1] 1598. The edition used by me is the 4th, dated 1717.

[2] P. 107.

[3] The manner of expeditating dogs is mentioned *In charta de Foresta* (9 H. 3) art. 6: *Talis autem expeditatio fiat per assisam communiter usitatam viz. quod tres ortelli abscindantur sine pellota de pede anteriori.* Coke, 4th Inst. on Courts of the Forest, p. 308 of edition of 1797, explains *ortelli* from French *orteiles* — claws; and *pellota* from the French *peolte. Sine pelota*, without the ball of the foot.

[4] 4 ed., 113.

in the king's forest provided only they were maimed — maimed not to protect the subject but to protect the wild beast whom they were disabled from pursuing — how much more undoubted was the right to keep unexpeditated dogs[1] on the Welsh marshes or the Scottish border, or on the trackless Yorkshire moors, or amongst the Westmoreland and Cumberland hills.

That any such doctrine as that now broached was quite unfamiliar to so experienced a common lawyer as Lord Kenyon, C. J., may be gathered from his ruling in the case of Brock *v.* Copeland:[2] "Every man had a right to keep a dog for the protection of his yard or house: that the injury which this action was calculated to redress, was where an animal known to be mischievous was permitted to go at large, and the injury therefore arose from the fault of the owner in not securing such an animal, so as not to endanger or injure the public: that here the dog had been properly let loose." Therefore the keeping the dog could not have been unlawful.

The principle of this decision was affirmed four years later by the Court of King's Bench in Bates *v.* Crosbie[3] which held that "where a fierce and vicious dog is kept chained for the defence of the premises, and anyone incautiously, *or not knowing of it*, should go so near it as to be injured by it, no action can be maintained by the person injured, though he was seeking the owner, with whom he had business." The judges sitting in the King's Bench were Lord Kenyon, C. J., and Ashhurst, Grose and Lawrence, JJ., whom posterity has credited with a more than usual acquaintance with the principles of the common law.

Brock *v.* Copeland was cited in Bird *v.* Holbrook,[4] and approved by the Common Pleas as an authority for the proposition "that a man had a right to keep a dog for the preservation of his house"; and a dog here must obviously mean a dog known to be savage; for, as to other dogs, there never could have been a doubt as to his right to keep them for any purpose whatever. There is no hint of any suspicion of the existence of the three learned judges' principle — that he was so entitled only if he knew that it was useless for the purposes of protection, or at any rate only if he did not know whether it was any good or not.

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[1] Manwood, 118, §§ 47, 48.

[2] 1 Esp. 203, 5 R. R. 730 (1794).

[3] M. T. 1798; 3 Christian's Blackstone, 154 n. (2).

[4] 4 Bing. 628, 29 R. R. 657 (1828).

The case of Beck *v.* Dyson, a ruling of Lord Ellenborough, C. J.,[1] reported by the future Lord Chancellor Campbell, need not be much relied on though it points in the direction we are going. This new principle of the Court of Appeal was expressly negatived by Tindal, C. J., one of the very greatest common lawyers of the last century, who in Sarch *v.* Blackburn[2] says: "Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation in the way of access to his house that a person innocently coming for a lawful purpose may be injured by it."

It may be objected that this case is only at *nisi prius;* yet it was the ruling of a judge than whom none of his time was supposed to know common law more extensively or more accurately, and is cited by the chief text writers as correctly stating the law;[3] and in conjunction with the other evidence we have been able to bring may be held to refute the statement that "the keeper of a ferocious dog, if he knows it to be ferocious, is in exactly the same category as the keeper of a naturally wild animal."

In dealing with this point the case of Smith *v.* Pelah[4] perhaps ought not to be passed over, as it is the only case that gives any semblance of authority for the principle accepted by the Court of Appeal. There Lee, C. J.,[5] is credited with holding "that if a dog had once bit a man and the owner having notice thereof keeps the dog and lets him go about or be at his door, an action will lie against him at the suit of a person who is bit though it happened by such person treading on the dog's toes, for it was owing to his not hanging the dog on the first notice." But this humane and acute expression goes beyond even the anti-canine ardour of the Court of Appeal; who disclaim any liability to attach "where the plaintiff by his own conduct has brought the injury on himself";[6] and the

[1] 4 Campb. 198, 16 R. R. 774 (1815).

[2] 4 C. & P. 297, 34 R. R. 805 (1830); Curtis *v.* Mills, 5 C. & P. 489.

[3] *E. g.*, Clerk and Lindsell, Torts, 3 ed., 145; Addison, Torts, 8 ed., 713; Salmond, Torts, 355; Cooley, Torts, 2 ed., 407. Pollock, Torts, 8 ed., does not seem to deal with the point.

[4] 2 Str. 1264, inconsistent with the King's Bench decision in Bates *v.* Crosbie, *ante*, p. 488.

[5] Lord Campbell, Lives of the Chief Justices, vol. ii, p. 214, discussing this learned C. J. (1688-1754), says: "The honours of the profession may be considered a lottery; or if they are supposed to be played for — in the game there is more of luck than of skill." "The dull and despised William Lee did plod, did persevere and did become Chief Justice of England." And the passage extracted gives far from an unjust view of his merits.

[6] [1908] 2 K. B. 833.

best way of treating this ebullition is probably that of Cresswell, J., in Charlwood *v.* Greig,[1] who mingles contempt with irony in his expression: "Our criminal law has been much modified since that time, and that would not now be considered as a proper mode of proceeding."

(4) The fact that through the fault of one fellow servant another is bitten does not affect an innocent master with liability.

One of the strangest features of this case is that throughout it the principle of the common law, that holds a master exonerated from liability for injury arising to one fellow servant from the negligence of another, might have been non-existent for any recognition it receives from any of the six judges (including the very learned County Court Judge) who have given judgment upon it. Yet the undisputed facts were these: A young woman in the service of the defendant had been bitten by a ferocious (if you please) dog owned by her master and entrusted to a potman, the defendant's servant, and her fellow servant, to keep securely. "Instead of performing his duty, he incited it [the dog] to fly at the plaintiff."[2] Now apparently this case is within the very words of the principle as expounded by Lord Cairns, C.,[3] declared by the House of Lords to be the law of England in Wilson *v.* Merry and Cunningham: "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted, or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work."

And this is not a common law principle want of acquaintance with which may be palliated on the ground that it is obscured by age or rusted through desuetude; for in Burr *v.* Theatre Royal, Drury Lane, Ltd.,[4] a case in which Cozens-Hardy, L. J., was a member of the Court, that great common lawyer, Collins, M. R., now Lord Collins, says: "It is a fundamental principle of law, except where the legislature has provided to the contrary" [Baker *v.* Snell is an action at common law], "that, wherever the relation of employer and employed exists, there is this limitation of the liability of the employer as regards injury occasioned by the negligence of a fellow servant." Collins, M. R., was alluding to the

[1] 3 C. & K. 46.
[2] Per Channell, J., [1908] 2 K. B. 355.
[3] 1 Sc. App. 326, 332 (1868).
[4] [1907] 1 K. B. at 555.

passage just cited from Lord Cairns, C.'s judgment. And while I am writing this the second division of the Court of Appeal has once more acted on this principle — which, as Collins, M. R., says, is a fundamental one.[1]

The Divisional Court crowned its work in this case by ordering a new trial. This was apparently to leave to a jury the question "whether the man's [the potman's] wrongful act was done in the course of his employment or whether it was done for purposes of his own."[2] *Cui bono?* If the act was done in the course of his employment (of which by the way there is not a suggestion) the principle we have just introduced to the case for the first time is obviously applicable. If it was done "for purposes of his own," the liability of the master is equally negatived — unless on the supposition, which has been already examined, that keeping a dog that has snapped is *ipso facto* a wrongful act; but that is not Channell, J.'s view;[3] and, even if it were, would need the introduction of yet another brand new Court of Appeal principle to vitiate the existing contract.

There is no dispute as to the facts, and no evidence that the man's act was in the course of his employment; so that even did a jury find that the act was so it would be the duty of the Court to enter judgment for the defendant.[4]

If Channell, J.'s method of getting rid of the case, by means of a bold and perverse finding by a jury, should be entertained as a means of avoiding the determination of problems too hard to be dealt with directly and judicially, the suggestion may be hinted that the jury should rather be enticed to venture even further and to find that the potman was incompetent; for in that event the difficulty of the common employment would be evaded, and by finding the servant incompetent only veracity would be tampered with, and not a fundamental principle of law. But we must part with this case, though unwillingly; for its interest is far from exhausted; and it is a very magazine of the principles of the common law, since *Contrariorum eadem est scientia*, and, however amazing the doctrine it broaches, it yet points to the light.

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[1] Coldrick *v.* Partridge, Jones & Co. Ltd., 25 Times L. R. 218.

[2] Per Channell, J., [1908] 2 K. B. 355. [3] *Ibid.* 354.

[4] Allcock *v.* Hall, [1891] 1 Q. B. 444; Coyle *v.* G. N. Ry. Co., Ireland, 20 L. R. Ir. 409, 418.